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December 6, 1996

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Christopher J. Wright, Esquire
Deputy General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington DC 20554

Re: Section 271(e)(1) of the 1996 Act—CC Docket No. 96-149

Dear Chris:

This responds to the questions raised in our meeting with you on behalf of Pacific Telesis Group on December 4, 1996 regarding implementation of section 271(e)(1) of the Telecommunications Act of 1996.

Section 271(e)(1)[1] states that large interexchange carriers (e.g., AT&T, MCI, and Sprint) may not "jointly market" a BOC's telephone exchange service obtained at wholesale rates under §251(c)(4) with its interLATA services. Section 272(g)(2)[2] provides that a BOC may not "market or sell" its affiliate's interLATA services until such company receives interLATA authority under §271(d).

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[1] Section 271(e)(1) provides:

Joint marketing of local and long distance services—Until a Bell operating company is authorized pursuant to subsection(d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

[2] Section 272(g)(2) provides:

Bell operating company sales of affiliate services—A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d) of this title.

As the Commission has said, these sections "appear to be parallel provisions that are intended to prevent BOCs and the largest interexchange carriers from marketing local and long distance services jointly prior to the BOCs' entry into in-region interLATA service, if the interexchange carrier is purchasing incumbent LEC services pursuant to section 251(c)(4) for resale. "[3]

1. As an initial matter, we believe that advertising *per se* is a form of marketing as intended by the Act and that any attempt to categorically exclude advertising from "joint marketing" would fly in the face of clear Congressional intent.

- The plain and ordinary meaning of the words compels the conclusion that advertising of joint services is included in the joint marketing prohibition

  - Advertising is a form—indeed, the primary and most pervasive form—of marketing a service. The dictionary definition reveals that "marketing" is "the process or technique of *promoting*, selling, and distributing a product or service."[4] Advertising is simply one means of promotion—through public announcements aimed at increasing sales.

  - While we do not dispute that an IXC may separately market and sell interexchange services and resold local services—in separate advertisements, through separate marketing and sales channels, and with separate personnel—this does not override the prohibition on "joint marketing," i.e., marketing those services together on a combined basis. This includes combined advertising as well as any other combined marketing activities.

- The Commission in other contexts has found advertising to be part of joint marketing and has prohibited certain advertising.

  - As we discussed, Section 274(c) of the Act also refers to "joint marketing."[5] While it is true that Congress in Section 274(c)(1) enumerated both "marketing" and "advertising," the importance of Section 274(c) for present purposes is that Congress clearly described "advertising" as a constituent part of "joint marketing." Indeed, the Commission has said that in section 274(c)

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[3] NPRM, Docket 96-149, ¶91.

[4] Merriam-Webster Collegiate Dictionary, 10th Ed. (emphasis added).

[5] Section 274 (c)(1) provides:

> *Joint Marketing.*—(1) In general.—Except as provided in paragraph (2)—(A) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate; and (B) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

"'joint marketing' appears to contemplate the 'promotion, marketing, sales, or advertising' by a BOC for or with an affiliate."[6]

- Moreover, the Commission's Computer II rules include advertising within the ambit of marketing activities. Section 64.702(d)(1) of the rules provides that certain carriers "[s]hall not engage in the sale or promotion of enhanced services or customer-premises equipment, on behalf of the separate corporation," and the Commission has consistently interpreted this rule to prohibit certain joint advertising activities: "entities affiliated with the subsidiary may not engage in advertising that is product or service specific on behalf of the subsidiary."[7]

- The Commission also regulates the marketing of a variety of radiofrequency devices. In fact, Subpart I of Part 2 of the Rules relates to "Marketing of Radiofrequency Devices," and Section 2.803 specifies that "no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease)" certain devices.[8]

2. The record supports including advertising within joint marketing.

- Virtually all commenters either specifically agreed that advertising was included or assumed that it was included.

- For example, AT&T said that "'marketing' ... encompasses efforts by a firm to persuade a potential customer to purchase or subscribe to its services."[9]

- Only MCI argued that the term "jointly market" does not include advertising. However, even this argument was not based on statutory or definitional grounds. Instead, MCI asserts that advertising is not the "type of joint marketing" prohibited by Section 271(e)(1) because IXCs are permitted to provide both types of services through one entity. [10] From this premise, MCI reaches the unjustified conclusion that the same IXC employees and operations may market and sell both types of services, and that it would be more costly to duplicate advertising materials. In fact, MCI has put the cart before the horse. Because Congress did

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[6] NPRM, Docket 96-152, ¶53.

[7] Computer Inquiry II, Reconsideration of Final Decision in Docket No. 20828, FCC 80-628 (Dec. 30, 1980). *See also* American Information Technologies Corp. 98 F.C.C. 2d 943, n.15 (1984)("the unregulated subsidiary must do its own marketing, including all advertising relating to the offering of any service or equipment it offers").

[8] 47 C.F.R. §2.803.

[9] AT&T Comments at 54.

[10] MCI Comments at 46 (Aug. 15, 1996).

intend to prohibit all joint marketing until the BOCs have an opportunity to enter the interLATA market with similar joint marketing tools at their disposal, it necessarily follows that the same IXC employees and operations may not market and sell both types of services jointly.

3. Given the unambiguous meaning of the words, there is no room for a savings construction under *Ashwander*. [11]

- In the most recent statement of the *Ashwander* principle, the Supreme Court said that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent of Congress.*" *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988)(emphasis added). As indicated above, a categorical exclusion of advertising would fly in the face of the plain meaning of the words and the intent of Congress.

- Likewise, the Commission would not be entitled to *Chevron* deference where the statute is so clear. "That statutory interpretation by the board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."[12]

4. Even if the FCC had the authority to rule on acts of Congress, the inclusion of advertising within the meaning of joint marketing is constitutional.

- The First Amendment does not apply to the joint advertising of interexchange and local service because the conduct of joint marketing of those services is unlawful until the conditions of §271(e)(1) are met.

- Because the underlying activities are unlawful, messages about those activities are not protected. For this reason, the regulation of advertising in this context is no more constitutionally suspect than other areas where the FCC regulates advertising.

- The First Amendment does not protect messages about *unlawful* activities. "[T]he government may ban commercial speech ... related to illegal activity." *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

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[11] Ashwander v. TVA, 297 U.S. 288 (1936).

[12] *DeBartolo*, 485 U.S. at 574 *quoting* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, and n. 9 (1984).

- Under the threshold criterion of *Central Hudson's* four-part analysis, commercial speech "must concern lawful activity and not be misleading"[13] to be protected by the First Amendment.

- As in *Pittsburgh Press*, where the Court upheld a restriction on discriminatory employment advertising, advertising of an unlawful transaction is not protected by the First Amendment. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).

- Similarly, the advertising of lottery information illegal in some states may be prohibited. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

5. You raised the question of whether rules can be developed that would address the restrictions on advertising in section 271(e)(1) without impermissibly restricting lawful speech. We believe that such regulations are reasonable, consistent with the intent of Congress, lawful, and can be crafted. In fact, attached are proposed rules that would implement section 271(e)(1) in a constitutionally permissible manner that would be faithful to Congress' clear intent to prohibit joint marketing until the BOCs have an opportunity to enter the interLATA market.

- Regulations, like the ones proposed, which restrict advertising of the availability of interLATA services combined with telephone exchange services obtained from a Bell operating Company pursuant to section 251(c)(4) of the Telecommunications Act of 1996 prevent "joint" marketing, but would not prevent separate marketing of any lawful services.

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[13] *Central Hudson*, 447 U.S. at 566. If the remaining parts of the *Central Hudson* test were to be considered, section 271(e)(1)'s limitations on advertising would satisfy them. First, the government has a substantial interest in promoting fair competition in the local and interexchange markets. Second, the regulation directly advances the governmental interest by assuring that interexchange carriers will not be able to jointly advertise interexchange services and resold BOC local exchange services until the BOC has had a fair opportunity to engage in competitive joint marketing. Finally, the restriction is not more extensive than necessary to serve the governmental interest. The restriction applies to only to the largest interexchange carriers. These carriers have both the best ability to develop and jointly market services without using resold BOC services. They also have the greatest market power to compete unfairly if allowed to "jump the gun" by advertising and selling jointly services that the BOCs cannot yet provide on any basis. The large interexchange carriers are free to jointly market interexchange services and local services provided over their own facilities, which would advance the Act's goal of promoting facilities-based local competition. In *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), a majority of the Supreme Court emphasized the continuing validity of *Central Hudson*. As indicated in the opinion of Justice O'Connor, the Court may be expected to apply strictly the fourth prong of *Central Hudson*,—that there be a reasonable fit between the law's goal and its method. *See* 116 S. Ct. at 1521. Where Congress' goal is to restrict the joint marketing of interexchange and resold local exchange services, it is eminently reasonable to restrict advertising as a part of such joint marketing and no other reasonable and less restrictive means is available to prevent such joint marketing. This situation is quite unlike *44 Liquormart*, where the legislature was seeking to curb consumption of alcohol indirectly by suppressing price advertising.

- A requirement that interexchange carriers use separate marketing and sales channels with separate personnel to advertise, promote, sell, or otherwise market telephone exchange service obtained from a Bell operating company pursuant to section 251(c)(4) of the Telecommunications Act of 1996 would implement Congress' intent without restricting any lawful marketing activities.

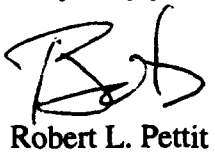
- A requirement limiting joint advertisements of lawful services to appropriate media would be consistent with a constitutionally permissible goal of banning misleading advertisements.

- In any event, the Supreme court recognized in *Edge Broadcasting* that restrictions on commercial speech, if they otherwise satisfy the *Central Hudson* test, may incidentally prevent some lawful advertisements.

Finally, as we discussed, I am enclosing a copy of the AT&T solicitation that promises "$15 toward your local phone bill after three months, as long as you stay a customer of AT&T."

Thanks, again, for meeting with us to discuss these critical issues. We would be happy to discuss them further with you. In the meantime, if you have any questions or would like something further, please let me know.

Very truly yours,



Robert L. Pettit
Counsel for Pacific Telesis Group

cc: Chairman Hundt
Commissioner Quello
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A. Richard Metzger, Jr.
Carol Mattey
Radhika Karmarkar
Linda Kinney
William F. Caton (for inclusion in the record in CC Docket No. 96-149)

Proposed Rule To Implement Section 271(e)(1)

§__ . ____ Joint Marketing of Local and Long Distance Services

(a) Until a Bell operating company is authorized pursuant to subsection(d) of section 271 of the Telecommunications Act of 1996 to provide interLATA services in an in-region State, or until February 8, 1999, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of the Telecommunications Act of 1996 with interLATA services offered by that telecommunications carrier.

(b) A telecommunications carrier restricted by subsection (a) may not: (1) advertise the availability of its interLATA services combined with telephone exchange services obtained from a Bell operating Company pursuant to section 251(c)(4) of the Telecommunications Act of 1996; (2) advertise or provide a single point of contact (including a single telephone number) to market or sell both services; (3) identify both services specifically in a single advertisement; (4) make both services available from a single source (including an agent of such carrier); (5) transfer customers live or online from the marketing contact for one service to a marketing contact for the other service; (6) provide bundling discounts for the purchase of both services; (7) offer one service conditioned on the purchase of the other; (8) offer both services as a single combined service; or (9) make joint marketing presentations relating to both services.

(c) A telecommunications carrier restricted by subsection (a) must use a separate marketing and sales channel with separate personnel to advertise, promote, sell, or otherwise market telephone exchange service obtained from a Bell operating company pursuant to section 251(c)(4) of the Telecommunications Act of 1996. Such separate marketing channel shall not engage in the sale or promotion of interLATA services offered by that telecommunications carrier.

(d) A telecommunications carrier restricted by subsection (a) may not advertise the availability of its interLATA services combined with telephone exchange services through media or channels that may reasonably be expected to reach a substantial number of customers to whom such carrier cannot provide local exchange service except by telephone exchange services obtained from a Bell operating Company pursuant to section 251(c)(4) of the Telecommunications Act of 1996.

AT&T

in LD.
High International
usage
to Middle
Canada

P.O. Box 2390
Chatsworth, CA 91311-2390

********** AUTO 3-DIGIT 949
Sandra Raffirashed
794 Saint Francis Avenue
Novato, CA 94947-2872

Dear Sandra Raffirashed:

Very soon, AT&T will be the only phone company you'll need for every call you make. Because in the near future, we'll be able to bring you local service, too.

Meanwhile, we'd like to show our appreciation to you for being a valued AT&T customer. We have two exciting offers that can save you money and help pay for your local phone bill until we can provide local service to you.

Save 50% on your weekend calls.

Sign up for AT&T True Reach International℠ Savings, and you'll save 50% on all your direct-dialed international calls on weekends for six months.* That's right, 50% off AT&T True Reach International Basic Plan rates every Saturday and Sunday.

On top of that, you'll be saving up to 25% every day of the week on all your other types of calls—direct-dialed, operator-assisted and long distance cellular calls, plus calls using your AT&T Calling Card, fax machine and modem. And there's more.

We'll give you $15 to help pay your local phone bill.

We'll send you $15 toward your local phone bill after three months, as long as you stay an AT&T customer. It's almost like getting free local phone service until you can choose AT&T local service, which we look forward to bringing you in the next few months. Then you'll be able to enjoy the same AT&T quality, reliability and service on local calls that you're already getting on long distance.

Watch for exciting news to come about our new AT&T local phone service as soon as it becomes available in your area. Until then, please call us at 1 800 822-0154, Ext. 382, by September 30, 1996, to take advantage of our special offers.

Sincerely,

Stephen M Jacobsen

Stephen M. Jacobsen
Marketing Vice President
Pacific Region

P.S. When you call, remember also to ask if you're getting all of the savings opportunities AT&T has for your calls around California and across the country.

* $3.00 monthly fee applies. AT&T basic residential rates for domestic calls apply whenever you spend less than $10 per month. When you spend $10–$24.99 per month your domestic discount is 10%. Qualifying calls and calls eligible for discount do not include conference calls and AT&T Calling Card calls that are not billed to a customer's main billed account, 900 # services, calls billed to a local exchange company calling card, marine calls, GTE Airfone and Railfone calls and taxes. Cellular long distance discount is provided in the form of a credit on your phone bill and is subject to additional conditions and exclusions. You must be a residential subscriber to AT&T to receive these discounts.